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SUPREME COURT, U.S.

No. 06-961

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

RICHARD JOSEPH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nothing in Joseph's brief in opposition to certiorari review explains away the Sixth Circuit's mistakes in affirming the district court's grant of the habeas writ. On the contrary, Joseph's brief confirms the need for reversal.

The facts surrounding the Warden's petition are not complicated. Richard Joseph and Jose Bulerin were jointly charged with kidnapping and murdering Ryan Young. Under Ohio law, purposefully killing the victim during a kidnapping is aggravated murder and a separate basis for imposing a death sentence. The death penalty specification under which Joseph and Bulerin were indicted mistakenly alleged that the defendants were principal offenders in the kidnapping, as opposed to principals in the murder. Nevertheless, Joseph did not object to the indictment or to the jury instruction that repeated the specification's mistaken language. The jury found Joseph guilty of the charge and specification, and all twelve jurors signed a verdict form stating that Joseph was the principal offender in the aggravated murder.

The Warden's petition presents a straightforward argument: The Sixth Circuit exceeded its authority in granting habeas corpus relief to Joseph, because Joseph's challenges to the indictment and instruction were procedurally defaulted; and because, in excusing Joseph's default, the Sixth Circuit ignored the factual findings underpinning the state court's conclusion that Joseph could not have been prejudiced, in view of the jury's unanimous finding that he was a principal offender in the aggravated murder. In granting relief on Joseph's insufficiency-of-the-evidence and Eighth Amendment claims, the Sixth Circuit compounded its error by finding constitutional violations based on its own interpretation of Ohio law and on one of its own decisions that had been reversed by this Court.

None of Joseph's arguments in defense of the Sixth Circuit's decision succeeds. First, he argues that the Sixth

Circuit correctly granted relief on his insufficiency-of-the-evidence claim, see Brief in Opposition ("Opp.") at 2-5, because the Sixth Circuit's interpretation of Ohio law is "plainly supported," Opp. at 4. Joseph suggests that the Sixth Circuit simply applied state decisions that define "principal offender" as the "actual killer." But neither Joseph nor the Sixth Circuit cites any Ohio court decision that requires "proof that the defendant personally inflicted the death blows," see 6th Cir. slip op. at Appx. 24a, where the evidence also implicates a co-defendant. In any event, it is the Supreme Court of Ohio's interpretation of Ohio law—and not the Sixth Circuit's—that controls. The Supreme Court of Ohio held previously that there can be more than one "principal" or "actual killer" for the purposes of sustaining a capital specification, and, in Joseph's case, it held that a jury could reasonably find based on the evidence that Joseph actually killed Young. And the Supreme Court of Ohio's interpretation of Ohio law is binding. *Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604 (2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

Neither the prosecutor's trial arguments nor state justices' dissenting opinions can support the Sixth Circuit's decision. Like the Sixth Circuit, Joseph attempts to buttress his arguments by pointing to the prosecutor's arguments at trial and the dissenting opinions of state justices. Opp. at 4, 5 & n.2. But like the Sixth Circuit, Joseph fails to cite any decision that equates argument with evidence. And Joseph ignores the distinction between the Supreme Court of Ohio's independent statutory review—which permits the reweighing of the evidence—and the stricter constitutional test for evidentiary sufficiency required by *Jackson v. Virginia*, 443 U.S. 307 (1979). A majority of the Supreme Court of Ohio concluded that the evidence in Joseph's case was sufficient under the *Jackson* standard. As the Warden previously noted, Chief Justice Moyer in dissent did not disagree with the majority's conclusion, but would have reversed the death

sentence based on his statutorily required independent review. *State v. Joseph*, 73 Ohio St. 3d 450, 470 (1995).

Joseph incorrectly maintains that the Warden waived his challenge to the "merits" of the Sixth Circuit's rulings. Opp. at 6. Procedural default is an adequate and independent ground of decision that precludes "merits" review of the petitioner's claims. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Thus, by arguing before the Sixth Circuit that Joseph's procedural defaults precluded the district court's "merits" review of Joseph's claims, the Warden did not concede that the district court's merits review was substantively correct. Moreover, the Sixth Circuit addressed and affirmed on the "merits" the district court's grant of relief. It is well-established that the Court's practice permits review of any issue that has been passed upon by the lower court. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (collecting cases). Therefore, the "merits" of Joseph's claims are properly before the Court.

Moreover, the Warden cannot be faulted for contesting the district court's decision based primarily on Joseph's procedural default. Application of Ohio's contemporaneous objection rule is a plain procedural bar; it is a reasonable argument that the district court committed clear error in rejecting the Warden's default defense. See *Engle v. Isaac*, 456 U.S. 107 (1982). And Joseph's invocation of ineffective counsel as "cause and prejudice" to excuse his defaults necessarily required examination of the "merits" of the defaulted claims, to the extent that the "merits" could be relevant to a prejudice determination.

Joseph cannot escape the Sixth Circuit's improper reliance on a decision reversed by this Court. He disputes that the Sixth Circuit granted him relief based on its prior decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002). Opp. at 6. Yet the Sixth Circuit explicitly stated: "The thrust of Joseph's argument is that his case is materially

indistinguishable from *Esparza I*. We agree." 6th Cir. slip op. at Appx. 26a. Like the Sixth Circuit, Joseph attempts to resurrect the *Esparza* opinion after this Court reversed the grant of relief in that case. He repeats the Sixth Circuit's contention that the Court left intact the Sixth Circuit's underlying rationale for finding an Eighth Amendment violation. That argument misses the point completely. The Sixth Circuit's view that Esparza's Eighth Amendment rights were violated was irrelevant unless the state court's contrary view contravened or unreasonably applied this Court's decisions. *Mitchell v. Esparza*, 540 U.S. 12, 17 (2004). The Sixth Circuit did not address that question in *Esparza*, as "it failed to cite, much less apply," the standard of review required by 28 U.S.C. § 2254(d). 540 U.S. at 15.[1]

Further, Joseph errs in reading the Supreme Court of Ohio's opinion as failing to evaluate his ineffective assistance claim. He contends that the state court findings cited by the Warden are not relevant because they were made in the course of the state's plain error review, Opp. at 12-13, but Joseph's arguments cannot sidestep the clear import of the state court's decision: The verdict could not have been affected by the mistake in the indictment and instruction because the jury unanimously found that Joseph was a principal offender in the aggravated murder. See *Mitchell v. Esparza*, 540 U.S. at 15. And the Supreme Court of Ohio's decision, in summarily rejecting Joseph's ineffective-assistance-of-counsel claim, *State v. Joseph*, 73 Ohio St. 3d at 454-55, counts as an adjudication that is entitled to deference in federal habeas. See *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (noting circuits' agreement that deferential standard applies even where state court decides a

[1] Joseph argues that the Sixth Circuit's Eighth Amendment holding is not "outcome determinative," because it found a due process violation. Opp. at 9 n.4. The Warden also maintains, however, that the Sixth Circuit erred in rejecting the Warden's procedural default defense, which barred all of Joseph's constitutional challenges to the indictment.

constitutional issue without discussion); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999) (collecting cases).

Finally, Joseph ignores the implication of the Supreme Court of Ohio's holding that no plain error occurred. Because Joseph relies on his counsel's alleged ineffectiveness to excuse his procedural defaults, Joseph must show a reasonable probability that the jury would have found he was *not* the principal offender in the aggravated murder, had the jurors *not* been mistakenly instructed that they were required to find that he was the principal offender in the kidnapping. But, as the Supreme Court of Ohio found, despite this mistake the jurors *still* unanimously found that Joseph was the principal offender in the aggravated murder. It is reasonably probable, if not certain, that the mistaken language did *not* affect the jury's verdict.

In sum, the Court should grant the Warden's petition and summarily reverse the Sixth Circuit's decision.

Respectfully submitted,

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